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Typically, social norms change slowly. Not so long ago, only 34% of Americans thought sexual harassment was a serious problem.[2] Then came Alyssa Milano's #MeToo tweet on October 15, 2017, which was retweeted over a million times.[3] Almost immediately, the percentage shot up to 64%.[4] By late 2017, roughly 75% of Americans believed that sexual harassment and assault were "very important" issues for the country,[5] and 86% of Americans reported endorsing a "zero-tolerance" policy toward sexual harassment.[6] That is a norm cascade.

Changes in public opinion do not automatically change the validity of legal precedent. Yet sexual harassment is a special case because "reasonableness" plays a central role in this domain in both procedural and substantive ways. Procedurally, the employer in a typical sexual harassment case files a motion for summary judgment that asks the judge to determine whether a "reasonable" jury could find for the plaintiff after making all factual inferences in the plaintiff's favor. Substantively, the law of hostile work environment—which generates the lion's share of sexual harassment cases—requires the plaintiff to prove that the hostility was severe or pervasive enough to create a hostile environment from the viewpoint of a "reasonable person" in the plaintiff's position, considering

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1. Summarized and excerpted from Joan C. Williams, Jodi Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Saron, *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139.

2. Juana Summers & Jennifer Agiesta, *CNN Poll: 7 in 10 Americans Say Sexual Harassment Is a Very Serious Problem*, CNN (Dec. 22, 2017) (reporting data from May 1998).

3. Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS NEWS (Oct. 24, 2017).

4. Gary Langer, *Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story, Poll Finds*, ABC NEWS (Oct. 17, 2017).

5. J. Baxter Oliphant, *Women and Men in Both Parties Say Sexual Harassment Allegations Reflect 'Widespread Problems in Society'*, PEW RESEARCH (Dec. 7, 2017).

6. Chris Jackson, *American Attitudes on Sexual Harassment*, IPSOS (Dec. 15, 2017).

"all the circumstances."[7] The norm cascade around sexual harassment in the wake of #MeToo affects what is "reasonable" in both contexts.

Reasonableness enters into sexual harassment cases in a third way. Employers long have used nondisclosure agreements (NDAs) to prevent employees from revealing sexual harassment they experienced in the workplace. Indeed, NDAs kept many harassment survivors silent for years before #MeToo emboldened them to speak out. NDAs executed in the employment context are enforceable only to the extent that they are "reasonable"[8] based on the nature and extent of the restraint, the employer's interest in secrecy, and the employee's and the public's interests in disclosure.[9] The norm cascade provides evidence of the strong interests of employees and the public in the disclosure of sexual harassment and is thus relevant to whether sexual harassment NDAs are reasonable.

The central role of reasonableness in this domain pivots the norm cascade directly into sexual harassment law. Reasonableness standards are meant to build flexibility and continuous updating into the law, yet many courts have failed to update their understandings of reasonableness in the sexual harassment context. Outdated cases decided under pre-#MeToo notions of reasonable workplace behavior are still cited as persuasive authority for dismissing sexual harassment cases. These anachronistic cases entrench outdated norms, foreclosing an assessment of what's reasonable now—which is precisely what sexual harassment doctrine demands.

Take, for example, *Brooks v. City of San Mateo*,[10] which has come to be known among the employment bar as the "one free grab" case. The plaintiff, 911 dispatcher Patricia Brooks, worked out of the police station in a city just south of San Francisco. While Brooks was on a 911 call, a senior dispatcher, Steven Selvaggio, put his hand on her stomach and commented on its softness and sexiness. Brooks told Selvaggio to stop touching her and forcefully pushed him away. "Perhaps taking this as encouragement," wrote Judge Alex Kozinski for the Ninth Circuit, Selvaggio trapped Brooks against her desk while she was on another call

7. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

8. *E.g.*, CSS, Inc. v. Herrington, 306 F. Supp. 3d 857, 881 (S.D. W. Va. 2018).

9. *E.g.*, Eden Hannon & Co. v. Sumitomo Tr. & Banking Co., 914 F.2d 556, 563 (4th Cir. 1990); Hammons v. Big Sandy Claims Serv., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

10. 229 F.3d 917 (9th Cir. 2000).

and put his hand "underneath her sweater and bra to fondle her bare breast."[11] Brooks removed his hand and told him he had "crossed a line," to which Selvaggio responded that she needn't worry about cheating on her husband because he would "do everything."[12] Selvaggio then approached Brooks "as if he would fondle her breasts again."[13] "Fortunately," noted the court, "another dispatcher arrived at this time, and Selvaggio ceased his behavior."[14] Brooks reported Selvaggio, and the subsequent investigation revealed that "at least" two female coworkers experienced similar treatment.[15] Nonetheless, the court found that a reasonable person in Brooks's position would not find the harassment severe enough to create a hostile work environment.[16] This conclusion is hard to square with the fact that Selvaggio spent 120 days in jail after pleading no contest to criminal sexual assault for the same incident.[17]

In another case, *Mendoza v. Borden, Inc.*,[18] the Eleventh Circuit upheld a trial court's directed verdict, again taking the case away from a jury.[19] Mendoza was an accounting clerk who alleged sexual harassment by Daniel Page, the plant controller and highest-ranking executive at her work site.[20] Mendoza testified that Page followed her around not only when she was working but also during lunch when she went outside to eat at a picnic table.[21] Mendoza testified that "[Page] would look me up and down, very, in an obvious fashion."[22] Three times he "looked at [her] up and down, and stopped in [her] groin area and made a . . . sniffing motion."[23] One day while Mendoza was at a fax machine, Page came up and "rubbed his right hip up against [Mendoza's] left hip" while grabbing her shoulders; "he had a smile on his face . . . like he was enjoying himself."[24] When Mendoza went into Page's office, angry, and said, "I

11. *Id.* at 921.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 922.
16. *Id.* at 926.
17. *Id.* at 921.
18. 195 F.3d 1238 (11th Cir. 1999) (en banc).
19. *Id.* at 1241.
20. *Id.*
21. *Id.*
22. *Id.* at 1242–43.
23. *Id.* at 1243.
24. *Id.* at 1243, 1272.

came in here to work, period," he replied, "[Y]eah, I'm getting all fired up, too."[25]

The Eleventh Circuit found no sexual harassment as a matter of law. Instead of examining how a reasonable person in Mendoza's position could characterize the work environment, the court relied upon a long string of earlier cases finding no sexual harassment absent "extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment."[26] The court seemed to be saying that no reasonable person or jury could find a hostile atmosphere in a wide variety of contexts that most Americans today consider sexual harassment.[27] At a deeper level, the view that only an extensive pattern of uninhibited threats can sustain a cause of action for sexual harassment signals the belief that sexual harassment is not serious unless it is downright frightening.

Courts have used cases like *Brooks* and *Mendoza*, each of which has been cited more than 1,180 times, to ratchet up the substantive standard for what constitutes a hostile work environment and to take those cases away from juries by substituting judges' own opinions about what a reasonable person would consider to be a hostile work environment. In light of the norm cascade represented by #MeToo, cases like *Brooks* and *Mendoza* do not reflect what most Americans today believe is reasonable workplace behavior. Thus, judges should not use them as precedent for what is reasonable today.[28] Instead, judges should let the jury system do its work, updating the law on sexual harassment based on prevailing norms of what's reasonable now.[29]

The norm cascade prompted by #MeToo also has implications for the reasonableness of NDAs designed to prevent disclosure of information

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25. *Id.* at 1243.

26. *Id.* at 1247.

27. *The Behaviors Americans Count as Sexual Harassment*, BARNA (Nov. 28, 2017).

28. Other outdated cases include *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1994), *Bowman v. Shawnee State University*, 220 F.3d 456 (6th Cir. 2000), and *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871 (5th Cir. 1999).

29. For examples of reasonableness interpretations more consistent with contemporary standards, see Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Allen v. Tyson Foods, Inc., 121 F.3d 642 (11th Cir. 1997); Hostetler v. Quality Dining, Inc., 218 F.3d 798 (7th Cir. 2000); Williams v. Gen. Motors Corp., 187 F.3d 553 (6th Cir. 1999); Harvill v. Westward Commc'ns, 433 F.3d 428 (5th Cir. 2005).

related to sexual harassment in the workplace. NDAs executed in the employment context are enforceable only to the extent that they are "reasonable"[30] based on a weighing of factors including the nature and extent of the restraint,[31] the employer's interest in maintaining secrecy,[32] the employee's interest in disclosure,[33] and the public's interest in disclosure.[34]

Courts consistently have held that it is not reasonable to enforce an NDA to bar an individual from disclosing information about harassment in judicial proceedings[35] or to regulators at the Equal Employment Opportunity Commission (EEOC).[36] No case law squarely addresses the question of disclosures made outside of legal proceedings, but based on a balancing of the relevant interests, it will rarely be reasonable for NDAs to silence survivors who wish to publicly discuss their harassment.

The interests of the employee and the public in such disclosures are strong. The speech restrictions in an NDA cannot be "so large as to . . . impose undue hardship on the [employee]."[37] Survivors who wish to disclose their harassment have strong psychological and health interests in doing so.[38] There are many psychological and physical harms associated with sexual harassment.[39] Mental health professionals caution that keeping the experience of harassment secret is "literally toxic to [one's] health" because timely treatment and care is essential for mitigating harm.[40] NDA restrictions also must not "interfere with the public interests."[41] The public

30. *E.g.*, CSS, Inc. v. Herrington, 306 F. Supp. 3d 857, 880 (S.D. W. Va. 2018).

31. *See* Eden Hannon & Co. v. Sumitomo Tr. & Banking Co., 914 F.2d 556, 563 (4th Cir. 1990).

32. *See* Shepherd v. Pittsburgh Glass Works, LLC, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011).

33. *See id.* at 1247.

34. *See id.* at 1233.

35. *See* Kalinauskas v. Wong, 151 F.R.D. 363, 365 (D. Nev. 1993).

36. E.E.O.C. v. Astra USA, Inc., 94 F.3d 738, 744 (1st Cir. 1996).

37. Hammons v. Big Sandy Claims Serv. Inc., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

38. Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC: BETTER (Oct. 13, 2017).

39. *See id.*

40. *Id.*

41. *Id.* at 315. *See* Mountain Comprehensive Health Corp. v. Gibson, 2015 WL 1194508, at *2 (Ky. Ct. App. Mar. 13, 2015); OVRS Acquisition Corp. v. Cmty. Health Servs., Inc., 657 N.E.2d 117, 126 (Ind. Ct. App. 1995).

has interests in employees' ability to find work in their chosen field,[42] the free flow of information in markets,[43] integrity in corporate governance,[44] exposing illegal activity,[45] revelations implicating public health and safety,[46] and a discrimination-free workplace.[47] Disclosures of sexual harassment advance all of these public interests.

The reasonableness of sexual harassment NDAs also depends on the employer's interest in secrecy, but this should rarely outweigh the employee's and public's interests in disclosure. Courts evaluating the reasonableness of NDAs scrutinize closely whether confidentiality is "reasonably necessary for the protection of the employer."[48] An employer cannot simply assert a bald preference for secrecy but rather must assert a "legitimate and substantial business justification"[49] for the restriction and demonstrate that the restriction is no "greater than is needed to protect the [employer's] legitimate interest,"[50] such as when the employer can show that disclosure would create "imminent peril of suffering significant competitive losses."[51] Disclosure of sexual harassment in the employer's workplace does not typically harm the employer's competitive position. Disclosure may cause reputational harm or embarrassment, but no NDA case has found this to be a "legitimate and substantial business justification" for confidentiality, and in other contexts, courts have found that even severe embarrassment is not sufficient to demonstrate competitive harm.[52]

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42. Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 521 (S.D. 1996).

43. DONALD J. ASPELUND & JOAN E. BECKNEW, EMPLOYEE NONCOMPETITION LAW § 2.1 (2018).

44. Espinoza v. Hewlett-Packard Co., 2011 WL 941464, at *10 (Del. Ch. 2011).

45. Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 667 (Ohio Ct. App. 1988).

46. *Id.*

47. Llerena v. J.B. Hanauer & Co., 845 A.2d 732, 737 (N.J. Super. Ct. Law Div. 2002).

48. PharMethod, Inc. v. Caserta, 382 Fed. App'x. 214, 220 (3d Cir. 2010) ("A restrictive covenant is reasonably necessary for the protection of the employer when it is narrowly tailored to protect an employer's legitimate interests.").

49. Banner Health Sys. v. NLRB, 851 F.3d 35, 41 (D.C. Cir. 2017).

50. Ellis v. James V. Hurson Assocs., 565 A.2d 615, 618 (D.C. 1989).

51. Uniroyal Goodrich Tire Co. v. Hudson, 97 F.3d 1452 (6th Cir. 1996).

52. United Techs. Corp. v. U.S. Dept. of Defense, 601 F.3d 557, 562 (D.C. Cir. 2010).

Judges may soon face an avalanche of opportunities to reflect on the impact of the norm cascade on the law. In a recent Gallup poll, 38% of Americans said that recent events have made them more likely to sue.[53] Plaintiffs' employment lawyers and human-resources professionals report being deluged with sexual harassment complaints.[54] The dramatic change in norms surfacing these complaints has occurred in a very short period of time. Courts must take these norms into account in deciding sexual harassment cases. These new norms define what it means to be a "reasonable jury" or a "reasonable person in the plaintiff's position." They define what information an employer may "reasonably" ask an employee to conceal about sexual harassment. In short, they define what's "reasonable" now. Federal judges should allow juries to do the difficult work of grappling with facts and establishing norms about what conduct is considered appropriate in the age of #MeToo.

53. Lydia Saad, *Concerns About Sexual Harassment Higher Than in 1998,* GALLUP (Nov. 3, 2017).

54. *See* Amelia Gentleman & Joanna Walters, *#MeToo is Raising Awareness, But Taking Sexual Abuse to Court is a Minefield*, GUARDIAN (Oct. 20, 2017); Yuki Noguchi, *#MeToo Complaints Swamp Human Resources Departments*, NPR (June 4, 2018), Maya Rhodan, *#MeToo Has 'Tripled' Web Traffic for the Federal Agency That Investigates Harassment*, TIME (June 12, 2018).

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